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1900 GUARDIANSHIP AND REPRESENTATION

1901 Overview

This chapter presents the DES/DDD policies regarding guardianship and representation for individuals with developmental disabilities. The chapter includes information regarding guardianship and conservatorship surrogate parents, authorized representative for ALTCS benefits and representative payee.

1902 Guardianship and Conservatorship

Guardianship is a legal method that is used to insure that a person who is unable to make reasoned decisions has someone specifically assigned to make decisions on his/her behalf. A guardian must be appointed by a court. A conservator refers to a person appointed by a court to manage the estate of a protected person. A person may have a guardian, a conservator or both appointed by the court.

Guardianship or conservatorship for persons with developmental disabilities shall be:

- a. utilized only as is necessary to promote the well-being of the individual;
- b. designed to encourage the development of maximum self-reliance and independence in the individual; and
- c. ordered only to the extent necessitated by the individual's actual mental, physical and adaptive limitations.

A.R.S. § 36-551(17); §14.5101, et seq.; § 36-564(D)

1902.1 Appointment of a Guardian or Conservator

Only a court can determine that someone needs a guardian. Neither the family nor a Support Coordinator can unilaterally or jointly make that determination. However, the individual himself/herself, a family member, or any person interested in his/her welfare may petition the court (file a request for a hearing in a State court) for a finding of incapacity and the consequent appointment of a guardian. The court will appoint an

attorney to represent the allegedly incapacitated person in the hearing unless the individual has his/her own attorney.

It should be noted that under Arizona law, a person with a developmental disability is presumed legally competent in guardianship proceedings until the court makes a determination to the contrary.

The person alleged to be incapacitated shall be interviewed by a person appointed by the court (called a court visitor) and examined by a court appointed physician, psychologist or a registered nurse who will submit written reports to the court. In addition, the court visitor shall interview the person seeking appointment as guardian, and visit the home of both the individual and the proposed guardian.

During the hearing, the individual who is the subject of the hearing, has the right to be represented by an attorney, to be present at the hearing, to see or hear all evidence, to present evidence, to cross-examine witnesses, and to trial by jury. If the individual alleged to be incapacitated or his/her counsel requests, the issue may be determined at a closed hearing.

Before a guardian can be appointed, the court must be satisfied "by clear and convincing evidence" that the appointment of a guardian or conservator is necessary to provide for the demonstrated needs of the individual.

In case of an emergency situation, the court can appoint a temporary guardian and/or a temporary conservator.

If the appointment of a guardian or conservator is required for a American Indian who is a member of an Indian Tribe and who has significant contacts with that tribe, but who is not an Indian child within the scope of federal law, the Arizona Administrative Code requires that the appointment of a guardian or conservator shall first be requested through the appropriate tribal court, if any, unless the request through the tribal court is not in the recipient's best interests as determined by the Individual Support Plan (ISP) team.

A.R.S. § 14-5303-5304; § 14-5310; § 14-5401; § 36-551(01)(H)
A.A.C. R6-6-1401

1902.2 Who May be Guardian

Any competent person may be appointed guardian by the Court. Persons who are not disqualified have priority for appointment as guardian in the following order:

- a. spouse;

- b. individual or corporation nominated by the person, if in the opinion of the court, the person has sufficient mental capacity to make an intelligent choice for guardian;
- c. an adult child;
- d. a parent, including a person nominated by will or other writing signed by a deceased parent;
- e. a relative with whom the individual has resided for more than six months prior to the filing of the petition;
- f. the nominee of a person who is caring for the person or paying benefits to him/her; or
- g. a public or private fiduciary, professional guardian, conservator.

The court may give preference for the appointment of a family member unless this is contrary to the expressed wishes of the individual or is not in his/her best interest as determined by the court.

Persons who wish to be considered for appointment as a temporary or permanent guardian or conservator must provide the court with all required information. Specifically, the proposed guardian must disclose any interest in any enterprise providing health care or comfort care services to any individual.

A.R.S. § 14-5311; § 14-5105

1902.3 Duties of a Guardian

A guardian's duties include but are not limited to:

- a. encouraging the individual to develop maximum self-reliance and independence;
- b. working toward limiting or terminating the guardianship and seeking alternatives to guardianship;
- c. finding the most appropriate and least restrictive setting for the individual consistent with his/her needs, capabilities and financial ability;
- d. making reasonable efforts to secure medical, psychological and social services for the individual;

- e. making reasonable efforts to secure appropriate training, education and social and vocational opportunities for the individual;
- f. taking care of his/her ward's clothing, furniture, vehicles and other personal effects;
- g. giving consents or approvals for medical or other professional care that may be necessary; and
- h. completing all reports required by the court.

To encourage the self-reliance and independence of the individual (the ward), the court may grant him/her the right to handle part of his/her money or property without the consent or supervision of a conservator. This may include allowing the individual to maintain appropriate accounts in a bank or other financial institution.

A.R.S. § 14-5312; § 14-5408(C); § 14-5315

1902.4 Procedures

As part of the annual review, the ISP team shall evaluate the possible need for a guardian and/or conservator for an individual receiving services through DES/DDD. This information must be noted on the ISP form DD-217 - 2 (Team Assessment Summary, cont, Appendix 800.B) under guardianship status.

When there is serious doubt regarding the ability of the individual applying for services or receiving services to make or communicate responsible decisions, every effort must be made to have a judicial determination made regarding the need for guardianship and/or conservatorship.

In the case of minor child where there is no parent or interested party who is willing and able to serve as guardian, the Support Coordinator should refer the child to Child Protective Services (CPS).

If an individual is 18 years of age or older, the parents are not the guardians unless they have been so appointed by the court. Thus, parents cannot continue to sign medical consent forms, etc. for their children who have become of legal age. The parents may wish to pursue guardianship status.

If the Support Coordinator and/or the ISP team believes that a determination of legal competency should be pursued, the Support Coordinator should:

- a. explain the need to the individual and/or family;
- b. work with the individual/and or family to help them understand the process necessary for obtaining a guardian and/or a conservator;
- c. refer the individual and/or family for help, if it is needed, in securing an attorney to handle the proceedings; (referrals, for example, to: Arizona Center for Law in the Public Interest, Community Legal Services, The Arc, etc., Appendix 100.A);
- d. if the individual/family is unwilling or unable to seek guardianship, the Support Coordinator must pursue guardianship by:
 1. writing a letter to the county public fiduciary where the individual receives services explaining the situation; and/or
 2. contacting Adult Protective Service (APS) for assistance (Appendix 100.A).

A.A.C. R6-6-1401

1903 Surrogate Parent

Parental involvement in the planning of a child's Individual Education Plan (IEP) is a federal requirement. For a child who is without a parent willing/able to participate in the child's educational process, federal and State laws provide for the appointment, by the court, of a surrogate parent to represent a child in decisions regarding special education.

A petition for a surrogate parent for a child with disabilities may be made if any of the three following conditions have been met:

- a. no parent can be identified;
- b. a public agency cannot determine the whereabouts of a parent after having made three reasonable attempts; or
- c. the child is a ward of the State and the biological parent is unwilling or unable to consent to special education placement.

A person who is an employee of a State agency which is involved in the education or care of the child is not eligible to be a surrogate parent. Thus, a DES/DDD Support Coordinator cannot be a surrogate parent. Moreover, a DES/DDD Support Coordinator cannot sign an authorization for a special education evaluation or an authorization for services for a child who has a developmental disability.

1903.1 Procedures

If a child who is receiving services through DES/DDD has a surrogate parent, this information must be noted on the ISP form DD-217 - 2 Team Assessment Summary, cont. (Appendix 800.B) under guardianship status and reviewed annually. In addition, the surrogate parent must be part of the ISP team.

A foster parent who wants to be a surrogate parent should work with the Support Coordinator in making a request to the courts. While a foster parent may petition the court to receive an appointment as a surrogate parent, the court is responsible for determining whether a particular individual is able to act as a foster parent and also represent the best interest of the child as a surrogate parent.

If the Support Coordinator believes a surrogate parent is necessary, e.g., the natural parents have relinquished their rights, the Support Coordinator should seek to have a surrogate parent appointed so that decisions regarding the child's education can be made in a timely manner.

The Arizona Department of Education (ADE) has information regarding surrogate parents and usually has a list of persons who have volunteered to be surrogate parents and have already received the required training.

Public Law 105-17
A.R.S. § 15-761; § 15-763, et seq.

1904 Authorized Representative For ALTCS Benefits

If there is a legal representative, that person must file the application for ALTCS benefits or authorize someone else to be the authorized representative. This is a person who is authorized in writing by an applicant or legal representative to represent him/her in the application process.

The authorized representative signs an affirmation to having knowledge of the applicant's circumstances, has been informed and understands the responsibilities which include:

- a. providing complete and accurate information to the best of his/her knowledge regarding the applicant's income, resources, household composition, citizenship, residency and medical insurance coverage;
- b. providing all documents needed to determine eligibility;
- c. notifying the local ALTCS office of any change in the applicant's circumstances within 10 working days of their occurrence;
- d. signing any and all forms necessary for completing the application and verifying eligibility; and
- e. identifying and filing insurance claims and assigning insurance benefits to AHCCCS.

Generally, a family member or a legally appointed guardian assumes the responsibility of being an authorized representative for an individual applicant. While a Support Coordinator may assist in the process of making application, the Support Coordinator should not be the authorized representative unless absolutely no one else is available. Before agreeing to becoming an authorized representative for an individual applying for ALTCS benefits, the Support Coordinator must have approval from the Support Coordinator's DPM or designee. (See also Chapter 500).

ALTCS Eligibility Policy and Procedure Manual

1905 Representative Payee

A representative payee is an individual who handles Social Security payments and Supplemental Security Income (SSI) payments for an individual who is unable to handle his/her own finances. The Social Security Administration makes the final decision on who is best suited to become the representative payee for an individual. A beneficiary who has a payee may be receiving either a Social Security check or an SSI check, or both.

The Social Security Publication No. 05-10076 entitled "A Guide For Representative Payees: Social Security and SSI" provides an overview of the duties of a representative payee. This pamphlet can be requested from a local social security office. In general, the duties of a representative payee are to decide how benefits can best be used for the beneficiary's personal care and well-being, to keep an accounting of the funds received, and complete all paperwork and forms required by the Social Security Administration.

In the case of a child with a developmental disability who has been adjudicated a ward of the court and is placed in foster care who is also eligible for SSI, DES becomes the representative payee. In this one instance the Support Coordinator is responsible to make the application on behalf of DES to the Social Security Administration as the representative of DES.

In all other situations, DES/DDD believes that parents, relatives, public fiduciaries, and advocacy groups may be in less of a conflict of interest situation that the agency in handling funds for an individual for whom it is providing services. DES/DDD may not become a representative payee for an individual receiving services unless permission has been granted by his/her DPM or designee.

1905.1 Procedures

If an individual with a developmental disability is receiving services through DES/DDD and has a representative payee, this information must be noted on the ISP form DD-217-2 Team Assessment Summary, cont. (Appendix 800.B) under guardianship statutes. In addition, the representative payee must be part of the ISP team, and must actively participate in the completion of ISP form DD-221 Individual Spending Plan (Appendix 800.H). The ISP form DD-221 also must be completed as part of the annual ISP if DES/DDD is the representative payee. (See Chapter 800 for details on the ISP).